NO. 84048-2

SUPREME COURT
OF THE STATE OF WASHINGTON

MITCH DOWLER and IN CHA DOWLER, individually and as limited guardian ad litem for NAM SU CHONG, *et al.*,

Appellants,

vs.

CLOVER PARK SCHOOL DISTRICT, NO. 400,

Respondent.

REPLY IN SUPPORT OF DIRECT REVIEW

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A. INTRODUCTION

The disability plaintiffs[1] have received the answer of the Clover Park School District No. 400 ("District") to their statement of grounds for direct review. As an initial matter, the District spends far more time in its answer focusing on the merits of the disability plaintiffs' appeal than it does addressing the appropriateness of direct review under RAP 4.2(d).

The District's answer also contains misleading statements of both the facts and the law and fails to offer any real reason why direct review should not be granted. Ultimately, the District *concedes* that no Washington court has addressed the issue of exhaustion of remedies under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1491. Ans. at 6. Accordingly, the Court should grant direct review pursuant to RAP 4.2(a).

B. REPLY TO THE DISTRICT'S STATEMENT OF THE NATURE OF THE CASE AND THE DECISION

The District misleads the Court regarding the facts and procedure in this case. For example, the District trumpets the disability plaintiffs' deposition testimony in an effort to reinforce the educational issues it believes still remain in the case. Ans. at 3-4, 13. In doing so, the District conveniently fails to mention that *all* of the disability plaintiffs'

[1] The named plaintiffs also include the natural parents, adoptive parents, and legal guardians of the students. For ease of reading, the plaintiffs will be referred to collectively as "disability plaintiffs" unless the context requires otherwise.

depositions occurred *months before* the trial court dismissed their educationally-related claims. The depositions to which the District refers in its answer at 3-4 occurred in March and April of 2007. *The disability plaintiffs voluntarily dismissed their educationally-related claims in November 2007.*

The District similarly fails to mention that the disability plaintiffs' Third Amended Complaint, which the District references in its answer at 2-3, 13, was filed *six months* before they voluntarily dismissed their educationally-related claims. Thus, their only remaining causes of action involve discrimination under RCW 49.60 *et seq.* and other tort claims. *No educationally-related claims remain.* The District has not provided the Court with any documentation to the contrary.

The District continues to mislead the Court when it refers to the disability plaintiffs' summary judgment response by claiming that "the response itself contained numerous educationally-related complaints." Ans. at 4-5. *See also,* Ans. at 13. The District neglects to mention that it filed *three* summary judgment motions relating to the disability plaintiffs' alleged failure to exhaust administrative remedies. The referenced "complaints" detailed in the District's answer at 5 appeared in response to the District's earlier summary judgment motions. Those "complaints" do not appear *anywhere* in the plaintiffs' response to the District's third

motion for summary judgment because they had been dismissed by the time of that third motion. Importantly, it is the District's third and final summary judgment motion and the trial court order granting that motion that form the basis of the plaintiffs' appeal and not the earlier summary judgment motions.

Finally, the plaintiffs do not claim that the District interfered with their rights to free and appropriate public educations ("FAPE"). Their claims are for physical and psychological abuse and blatant discrimination. Consequently, the District's detailed discussion of an individualized education program ("IEP") is irrelevant to the disability plaintiffs' claims remaining in this case. Ans. at 7-8.

C. REPLY IN SUPPORT OF DIRECT REVIEW

The apparent motivation for the District's nearly singular focus on the merits of the disability plaintiffs' case is to avoid a comprehensive discussion of RAP 4.2(a)(4), which would support direct review of this case. Ans. at 6-15. The District eventually makes a fleeting argument against direct review, merely stating the trial court's decision does not involve an issue of first impression involving a matter of broad public import because the IDEA's exhaustion requirement is well-settled throughout the United States. Ans. at 2, 5-6. The District's argument is baseless for a number of reasons.

First, this case *is* one of first impression. As the District eventually admits, no Washington court has addressed the issue of exhaustion of remedies under the IDEA. Ans. at 6. Nor has any Washington appellate court ever construed the IDEA or its exhaustion requirement in the context of abuse and discrimination claims like those at issue here, which do not impact a special education student's right to receive a FAPE. The District has not, and cannot, cite a single Washington appellate court decision definitively interpreting the IDEA in this context.

Second, this case involves an issue of broad public import. The District baldly asserts that the plaintiffs have failed to cite to any study or news account indicating the issue here involves an urgent matter of broad public import requiring immediate review by this Court. Ans. at 6. The disability plaintiffs are not required to submit such "proof" to the Court to obtain direct review. The disability plaintiffs' statement of grounds for direct review raises an important question that is likely to be repeated. Moreover, a definitive decision from this Court will affect more than the plaintiffs in this case. Special education students, their parents, and the school districts where those students are enrolled throughout the state will benefit from this Court's immediate interpretation of the IDEA in the context of this case.

Third, the District misleads the Court when it states "the vast majority of courts" have required exhaustion of administrative remedies under the IDEA and the matter is "well settled throughout the United States." Ans. at 1-2, 6. The District's statements are deceiving because the issue is far from settled. The Ninth Circuit, for example, has not required the exhaustion of IDEA administrative remedies in every case involving special education students.

The District chiefly relies on *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1169 (9th Cir. 2007), in an attempt to distinguish *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999), and *Blanchard v. Morton School District*, 420 F.3d 918, 921 (9th Cir. 2005), the controlling Ninth Circuit cases. Ans. at 12. The District's effort is unavailing.

In *Kutasi*, the disagreement centered on the student's disputed IEP. 494 F.3d at 1165-66. Relying on *Robb v. Bethel School Dist. # 403*, 308 F.3d 1047, 1050 (9th Cir. 2002), the Ninth Circuit held that the plaintiffs were required to exhaust their administrative remedies prior to filing suit because their educational injuries could be redressed by the IDEA. *Id.* at 1166, 1170. Although the Ninth Circuit limited *Witte* and *Blanchard*, it did not repudiate them. More importantly, the Ninth Circuit

recognized that a certain class of civil rights claims brought by special education students might fall outside the holding in *Robb*.

In *Witte*, a student with Tourette's Syndrome filed a § 1983 action seeking monetary damages after he was allegedly force-fed oatmeal, strangled, and subjected to emotional abuse. 197 F.3d at 1272-73. The Ninth Circuit concluded that he was not seeking relief that was also available under the IDEA because he sought only monetary damages and because all of his educational issues had been resolved. Accordingly, he was not required to exhaust administrative remedies before filing suit. *Id.* at 1275.

In *Blanchard*, the mother of an autistic child successfully argued no administrative remedy was available for her non-educational damages claims. 420 F.3d at 920. Emphasizing that the mother had resolved the educational issues implicated by her son's disability, the Ninth Circuit concluded exhaustion was not required because the mother's injuries and lost income could not be remedied through the educational remedies available under the IDEA. *Id.* at 921-22. Because the IDEA provided no remedy, exhaustion was not required. *Id.* at 922.

Like *Witte* and *Blanchard*, no educationally-related claims remain to be resolved in this case. Here, the disability plaintiffs dismissed all of their educationally-related claims *years* before the trial court ruled on the

District's third and final summary judgment motion. This is the critical distinction that both the trial court and the District fail to make.

Finally, the District outlines the duties of the Office of the Superintendent of Public Instruction ("OSPI") and then states that OSPI has the authority to resolve complaints involving the provision of special education and related services. Ans. at 9. Douglas H. Gill, Ed.D., Director of Special Education for OSPI, has already testified in a parallel case that OSPI cannot remedy the disability plaintiffs' claims of verbal and physical abuse, discrimination, and other common law causes of action, the precise issues now at stake in this case. Where the remedy for the plaintiffs' injuries cannot be addressed by the IDEA's administrative procedures, then the claim falls outside the IDEA's scope and exhaustion is unnecessary. *See Robb*, 308 F.3d at 1050.

D. CONCLUSION

This case addresses an issue of first impression meriting direct review. The disability plaintiffs allege that they were verbally and physically assaulted, harassed, and discriminated against. As a result, they suffered personal and dignitary torts that stand apart from the IDEA.

This case presents a pressing and substantial question which should be taken up by this Court now. Direct review is appropriate. RAP 4.2(a)(4).

DATED this 18th day of February, 2010.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Reply in Support of Direct Review in Supreme Court Cause No. 84048-2 to the following parties:

Thaddeus P. Martin IV
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415 12th Street W
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 18, 2010 at Tukwila, Washington.

Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

ORIGINAL

DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Reply in Support of Direct Review in Supreme Court Cause No. 84048-2 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 19, 2010 at Tukwila, Washington.

Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Paula Chapler
Subject: RE: Dowler v. Clover Park

Rec. 2-19-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Paula Chapler [mailto:paula@tal-fitzlaw.com]
Sent: Friday, February 19, 2010 9:37 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Dowler v. Clover Park

Per Mr. Talmadge's request, attached is the Reply in Support of Direct Review for filing in the following case:

Case Name: Mitch Dowler v. Clover Park
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Sincerely,

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